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1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4

5 CASEY CUNNINGHAM, et al.,) Civil Action No.
6 Plaintiffs) 16-cv-6525 PKC
7 vs.)
8 CORNELL UNIVERSITY, et al.,)
9 Defendants)
10

11
12 - C O N F I D E N T I A L -
13
14

15 Videotaped Deposition of Glenn R. Poehler
16 Washington, D.C.
17 October 18, 2018
18 9:03 a.m.

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21
22
23
24 Reported by: Bonnie L. Russo
25 Job No. 3028112

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1 leave the deposition open. You can just --

2 MR. ROHLF: Because it is entirely
3 relevant to his opinion.

4 MS. ROSS: I disagree with you. I
5 will stand by my position. We are not going
6 down this road.

7 MR. ROHLF: That's fine.

8 BY MR. ROHLF:

9 Q. Now, how long were you the leader of
10 the defined contribution recordkeeping unit for
11 Mercer?

12 A. I think I answered that question,
13 but I think I indicated it was about five
14 years.

15 Q. About five years. Okay. What was
16 your next role?

17 A. I moved into the role as a general
18 D.C. consultant primarily consulting on 401(k)
19 plans.

20 Q. Okay. And did you have any 403(b)
21 clients at that time?

22 A. I -- we had another person at the
23 time in the Richmond office who was doing some
24 403(b) work. I assisted him on a few of his
25 projects.

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1 Q. Okay. And of your 401(k) clients,
2 what was kind of the range of the participant
3 numbers for those plans?

4 MS. ROSS: Objection.

5 THE WITNESS: All sizes. Again,
6 from small to large.

7 BY MR. ROHLF:

8 Q. Okay. What was the smallest --
9 roughly the smallest plan?

10 A. Around a hundred employees.

11 Q. What was roughly the largest plan?

12 A. Probably, you know, between 10 and
13 20,000.

14 Q. Okay. And did any of those clients
15 have stable value funds?

16 A. I don't specifically recall.

17 Q. Okay. Did you evaluate the
18 reasonableness of the recordkeeping fees for
19 those plans?

20 A. I did do RFP processes for some
21 401(k) plans at that time.

22 Q. Did you evaluate recordkeeping fees
23 in any other way other than an RFP?

24 A. In general, yes, and in my role as a
25 401(k) consultant.

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1 Q. What process other than an RFP did
2 you use?

3 A. I don't recall using other processes
4 at the time, other than my general knowledge of
5 the marketplace.

6 Q. Okay. How long were you a 401(k)
7 consultant for Mercer?

8 A. Up until 1994.

9 Q. And what was your role after 1994?

10 A. I moved full-time into the 403(b).

11 Q. Why did you move from 401(k)
12 consulting to 403(b) consulting?

13 A. As I mentioned earlier, I had
14 started doing some support for the 403(b) area
15 prior to moving full-time into that area. I
16 saw it as an opportunity to specialize within
17 Mercer and become a leader in an area that was
18 specialized and allowed me to show my expertise
19 across multiple offices of Mercer.

20 Q. What types of 403(b) clients were
21 you advising in 1994 when you first began
22 working in that space?

23 A. All types of nonprofit and public
24 sector clients, including universities,
25 hospitals, charities, other types of

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1 nonprofits.

2 Q. Approximately what percentage of
3 your clients were hospitals at that time?

4 A. Again, it was a long time ago. I
5 can only give you an approximation of probably
6 half.

7 Q. So what percentage would be
8 charities?

9 A. A small percentage.

10 Q. So 5 percent?

11 A. I don't know.

12 Q. What percentage would be public
13 sector organizations?

14 A. Certainly -- certainly less than
15 half.

16 Q. Okay. What percentage would be
17 higher education?

18 A. Again, I don't have recollection of
19 25 years ago.

20 Q. Okay. Do you recall any higher
21 education plans you were advising in the 1990s?

22 A. Yes.

23 Q. Which ones?

24 A. The one I recall specifically is the
25 University of North Carolina system.

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1 Q. Okay. When did you begin advising
2 the University of North Carolina?

3 A. Early on in my role as a 403(b)
4 consultant.

5 Q. As a 403(b) consultant, what process
6 -- did you -- strike that.

7 As a 403(b) consultant, were you
8 involved in evaluating the reasonableness of
9 recordkeeping fees of the plans?

10 A. I did some RFP processes for
11 universities at that time.

12 Q. Okay. What universities did you
13 conduct RFPs for?

14 A. I did it for the University of North
15 Carolina, Vanderbilt, Howard University, I
16 believe were the ones I recall.

17 Q. Did you follow any process other
18 than using an RFP to evaluate recordkeeping
19 fees at that time?

20 A. Not that I recall.

21 Q. Did you have any 401(k) clients
22 after you transitioned over to the 403(b) role
23 at Mercer?

24 A. Some of my nonprofit clients also
25 had 401(k) plans once they became eligible to

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1 A. At that time, Mercer's standard
2 process for evaluating recordkeeping fees was
3 to perform an RFI, or request for information.

4 Q. Okay. When did Mercer begin using
5 RFIs versus RFPs?

6 A. I don't know the specific date.

7 Q. Can you give me a ballpark?

8 A. In the mid-2000s.

9 Q. Okay. Why didn't -- why did you
10 switch from RFPs to RFIs?

11 A. That wasn't my specific decision,
12 but my understanding is that we felt that that
13 would -- that was a way to benchmark the type
14 of clients we predominantly had at Mercer,
15 which are the more complicated cases.

16 Q. Okay. Did you ever use database fee
17 benchmarking to evaluate recordkeeping fees at
18 Mercer?

19 A. No.

20 Q. Why not?

21 A. We didn't maintain a database.

22 Q. Okay. I think you said you left
23 Mercer in 2014. Why did you leave?

24 A. I retired.

25 Q. Okay. Congratulations.

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1 copy of your September 14, 2018 report?

2 A. It appears to be.

3 Q. Okay. Did anyone assist you in
4 drafting this report?

5 A. Cornerstone Research.

6 Q. Who at Cornerstone Research assisted
7 you?

8 A. My main contact there was Kirvanc
9 Kirgiz.

10 Q. What type of assistance did
11 Cornerstone provide you?

12 A. They assisted me in the research for
13 sources of -- for the points I wanted to make
14 in this report. They -- I also used their
15 analyst staff to help create some of the charts
16 in the report and the formatting of the report
17 as well.

18 Q. Do you recall what sources
19 Cornerstone provided you?

20 A. All the material provided to me was
21 -- was through Cornerstone so all the -- all
22 the documents for this particular case that I
23 reviewed were sent through Cornerstone to me.

24 Q. Okay. So you received every
25 document you relied on from Cornerstone.

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1 A. I am -- my report documents the
2 general -- the general area of recordkeeping
3 fees that was consist -- was appropriate during
4 this time period.

5 Q. But you don't offer a range of fees
6 that is reasonable, do you?

7 A. Not specifically.

8 Q. Do you intend to?

9 A. No.

10 Q. Okay. Are you offering an opinion
11 on legally whether a plan sponsor can map
12 assets from TIAA individual annuity contracts?

13 A. I am not an attorney so I don't
14 render legal opinions.

15 Q. Okay. Did defendants' counsel
16 provide you any facts to rely on in forming
17 your opinion?

18 A. I don't know that I understand the
19 question.

20 Q. Did they -- did defendants' counsel
21 identify any facts that you should specifically
22 consider in forming your opinion?

23 A. I don't recall any specific facts,
24 no.

25 Q. Did they identify any specific

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1 MS. ROSS: Objection. Vague.

2 THE WITNESS: In general, the larger
3 the plan, the cost -- you get some economies of
4 scale based on larger plans, yes.

5 BY MR. ROHLF:

6 Q. And by large, do you mean asset size
7 or participant size?

8 A. Specifically, participant size in
9 general.

10 Q. So all things held equal, plans with
11 more participants tend to have lower fees than
12 plans with fewer participants, right?

13 MS. ROSS: Objection.
14 Mischaracterizes his testimony.

15 THE WITNESS: No. The bigger plans
16 cost more to operate than smaller plans.

17 BY MR. ROHLF:
18 Q. But on a per-participant basis,
19 generally plans with more participants have a
20 lower per-participant fee than those with less
21 participants, right?

22 MS. ROSS: Objection.
23 THE WITNESS: All things being
24 equal, that would be true, but that would
25 entail that the -- the provisions of the plan

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1 were the same, that the service was the same,
2 that the -- all the data flows were the same,
3 so there are a lot of -- a lot of components
4 that go into determining a recordkeeping fee
5 that -- that just doesn't vary based on size.

6 BY MR. ROHLF:

7 Q. So when comparing the recordkeeping
8 fees between plans, you should consider the
9 services that were provided --

10 A. Yes.

11 Q. -- data flows and other factors?

12 A. You have to incorporate all of those
13 issues. You have to understand the -- all the
14 service -- all the details of the required
15 recordkeeping, all the reporting requirements
16 for that particular plan, any customized
17 services you can provide to that plan, any, you
18 know, any communications services, on-site
19 support.

20 Q. So without knowing the exact
21 services and exact details of the plan, you
22 can't really make an accurate comparison to
23 another plan?

24 MS. ROSS: Objection.

25 Mischaracterizes his testimony.

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1 THE WITNESS: You -- that's the
2 information that a recordkeeper would need to
3 give a specific fee quote, so the more
4 information you have, it's always -- more
5 information is always better than less
6 information.

7 BY MR. ROHLF:

8 Q. Okay. All things held equal, would
9 a plan with 20,000 participants pay less per
10 participant for recordkeeping fees than one
11 with 600 participants?

12 MS. ROSS: Objection. Asked and
13 answered.

14 THE WITNESS: I think -- I think I
15 answered that question. It depends on the
16 complexity of the plan and the services being
17 provided, but again, if all things were equal,
18 that would be the case.

19 BY MR. ROHLF:

20 Q. Same for comparing a plan with
21 20,000 participants to a thousand?

22 A. Yes.

23 Q. 20,000 to 2,000?

24 A. You can continue going forever like
25 that. The answer is the same. It depends upon

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1 reviewed those proposals, the -- but they may
2 have.

3 Q. All right. Let's look at a couple
4 of them. I'm going to show you Exhibit 100,
5 what's been previously marked as Exhibit 100.
6 It is Cornell 006782.

7 A. Okay.

8 Q. And I'll just ask you, do you
9 recognize this document?

10 A. It's the -- it appears to be the
11 proposal from Segal Advisors to Cornell for
12 their project to obtain an investment advisor.

13 Q. Okay. Can you skip ahead to Page 25
14 of this document. It's going to be the ending
15 Bates No. 811 at the bottom of the document.

16 MS. ROSS: Before you ask any
17 further questions, I'm going to state that this
18 is a document that is 215 pages. I don't
19 believe that Mr. Poehler relied on this
20 document in his report or for his report, so to
21 the extent you are going to ask him questions
22 about it, I want you to give him ample time to
23 review.

24 MR. ROHLF: I'm fairly certain
25 it's in his materials considered.

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1 administrative services?

2 A. I would have to go back and review
3 it specifically, but my general impression from
4 reading his deposition was that he was very
5 comfortable with the model they had in place.

6 Q. Let's review exactly what he said.
7 This is going to be Exhibit 286.

8 (Deposition Exhibit 286 was marked
9 for identification.)

10 BY MR. ROHLF:

11 Q. It's going to come up and it should
12 say -- the title is going to be
13 PaulBursic_linkPDF.

14 A. I am not sure where I am looking
15 here.

16 MR. ROHLF: Can you reshare that
17 document with him? It is going to be No. 2.

18 THE WITNESS: Okay.

19 BY MR. ROHLF:

20 Q. All right. Do you have Mr. Bursic's
21 deposition in front of you now?

22 A. I have a deposition in front of me.
23 I am trying to determine whether it's Paul's.
24 Yes, I do.

25 Q. Okay. I think if you go -- let's

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1 see what we have here. If you jump ahead to
2 Page 44.

3 MS. ROSS: Again, for the record,
4 this is a 310 page document.

5 MR. ROHLF: Which he reviewed --
6 which he relied on in his report.

7 MS. ROSS: He has not had time to
8 review the entire deposition here today.

9 BY MR. ROHLF:

10 Q. So on Page 44, starting on Line 7,
11 you can see there is a question there, and I
12 will represent to you that is me asking this
13 question.

14 A. Okay.

15 Q. "During your time at Cornell, has
16 Cornell ever done an RFP for recordkeeping
17 services?"

18 And Mr. Bursic said: "No."

19 And then if you continue on to Line
20 13, he starts the sentence, he says: "It would
21 not be prudent to issue an RFP, asking some
22 company to do a specific task that's much more
23 efficient and effective and accurately
24 delivered as a bundled service."

25 Do you see that?

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1 A. I do.

2 Q. Do you agree with Mr. Bursic that it
3 wouldn't be prudent to conduct an RFP for
4 recordkeeping and administrative services only?

5 MS. ROSS: Objection.

6 MR. DOSCH: Objection.

7 THE WITNESS: I think you -- that in
8 determining whether an RFP would have been
9 prudent in this case, you have to take in the
10 situation that they were -- that they were in.

11 They have money with both TIAA-CREF
12 and Fidelity. They were in a situation where
13 neither of those firms would record keep the
14 other's funds. Not only wouldn't they, they
15 didn't -- they had not come to any agreement to
16 allow either to record keep the other's funds.

17 They were also in a place with --
18 within Cornell, that they were very concerned
19 about disruption within the organization. So I
20 think all of those things were part of the --
21 what I evaluated the comments of not only Mr.
22 Bursic, but others, that those considerations
23 were primary in their minds.

24 BY MR. ROHLF:

25 Q. Okay. In your practice at Mercer, I

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1 think we asked this earlier, but just kind of
2 circle back around, in your practice at Mercer,
3 did you rely on data-based fee benchmarking to
4 evaluate recordkeeping and administrative fees?

5 A. I did.

6 MS. ROSS: Objection. Asked and
7 answered.

8 BY MR. ROHLF:

9 Q. And I think we talked earlier, your
10 standard method of evaluating recordkeeping and
11 administrative fees was either an RFP or an
12 RFI; is that correct?

13 A. If I was doing benchmarking, it was
14 to use an RFI. Again, that was Mercer's
15 practice.

16 Q. Why was it Mercer's practice to use
17 an RFI?

18 A. As I -- as I stated before, that
19 wasn't my decision. It was a corporate
20 decision.

21 But in general, Mercer's clients are
22 larger, more complicated plans, so the feeling
23 was to get quotes that were as close as
24 possible to the specific services that were
25 needed for that plan, that an RFI process gave

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1 the client the information they needed to
2 determine whether or not the fees were still
3 reasonable.

4 Q. Okay. And in your opinion, were the
5 Cornell plans large and complicated plans?

6 A. They were.

7 Q. Okay. I'm going to share with you a
8 document that's going to be Exhibit 287.

9 (Deposition Exhibit 287 was marked
10 for identification.)

11 BY MR. ROHLF:

12 Q. And I'm going to ask you, do you
13 recognize this document.

14 Go ahead and take your time to
15 review it and respond whenever you're ready.

16 A. I do recall this document. The
17 version of the document you are showing here
18 indicated it was a draft, not necessarily the
19 final document used at this conference.

20 Q. Okay. What is it?

21 A. This is a -- this was a conference
22 of community college financial offices that --
23 officers that I spoke at in 2012.

24 Q. Okay. And you were the author of
25 this draft of this presentation?

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1 presentation given?

2 A. I do not.

3 Q. It is titled: "Benchmark
4 administrative fees, Mercer's methodology;" is
5 that correct?

6 A. Yes.

7 Q. Does this accurately reflect the
8 methodology that you used at Mercer to
9 benchmark fees?

10 A. Let me take a second to read it.

11 Q. Yeah.

12 A. Yes.

13 Q. Okay. Why did you look at fee
14 quotes from multiple providers?

15 A. It was a way -- it was a way to
16 create the range of fees that would be
17 considered reasonable for that specific --
18 specific plan and to demonstrate how the plan
19 we were evaluating compared to the range of
20 fees offered during the RFI.

21 Q. Why didn't you go and ask for a new
22 quote from the incumbent provider?

23 A. That wouldn't have been a specific
24 benchmark. In this case, you are asking how --
25 what methodology we used to benchmark fees.

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1 Q. Okay. Why didn't you go out and
2 look at it like a survey data or database of
3 what other plans were paying?

4 A. Again, this was Mercer's
5 methodology. Mercer didn't maintain a database
6 of that information so I didn't have that
7 information to utilize to do that.

8 Q. Okay. I think the fourth bullet
9 point says: "Vendors are instructed to provide
10 fee quotes on a 'recordkeeping only' basis to
11 allow benchmarking of their proposed fees to
12 the current vendor's fees independent of
13 investment selection."

14 Do you see that?

15 A. Yes.

16 Q. Why did you request vendors to
17 provide fee quotes on the recordkeeping only
18 basis independent of investment selection?

19 A. Recall now that I am talking to a
20 group of community colleges, the financial
21 offices of a group of community colleges, so in
22 general, smaller plans that would often get fee
23 quotes on a bundled basis, so what I am trying
24 to demonstrate here is, you know, we wanted to
25 get quotes on other than just a bundled basis,

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1 so we were able to separate the recordkeeping
2 costs from the total -- the total cost
3 including investment fees.

4 Q. Why is it important to separate the
5 recordkeeping costs from the total investment
6 fee costs?

7 A. Well, if you are benchmarking
8 recordkeeping costs, getting the -- getting a
9 bundled fee including an all in total bundled
10 fee doesn't give you the information you need
11 to benchmark recordkeeping costs.

12 Q. Okay. I think you testified earlier
13 that Mercer also at times advised clients to
14 conduct an RFP; is that correct?

15 A. We -- we talked to clients about
16 their situation. We advised them of what
17 options they had with regard to their plan on
18 an ongoing basis, including conducting RFPs,
19 including doing RFIs and negotiating with the
20 vendors.

21 Q. During your time at Mercer, did you
22 ever advise a client that database fee
23 benchmarking was sufficient to determine
24 whether their fees were reasonable?

25 A. You are asking me if I -- my tenure

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1 with Mercer lasted for 39 years. I can't give
2 you an answer of did I ever --

3 Q. Do you ever --

4 A. -- advise a client.

5 Q. That's fair. Do you ever recall
6 giving that advice to a client?

7 A. I don't have a specific recollection
8 of that.

9 Q. Okay. I think in your opinion, you
10 say that, you know, Cornell really didn't have
11 to conduct an RFP because of the expense and
12 time associated with the RFP?

13 A. I think that -- I said it's a
14 factor.

15 Q. It's a factor. Are there any other
16 factors that should be -- that would lead to a
17 plan not to conduct an RFP?

18 A. It's the factors I discussed before.
19 It was their -- there was their evaluation of
20 their current situation at Cornell. It was an
21 understanding of their limitations with regard
22 to what they could achieve with an RFP.

23 And it was a -- it was a factor
24 based upon their -- how they felt the job that
25 TIAA and Fidelity was doing for them.

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1 back well before the creation of 401(k) plans,
2 so we have got a situation here where -- for a
3 plan that was -- at least for the CURP, that
4 was implemented in 1940 and came under 403(b)
5 with the creation of 403(b) in 1958.

6 The only vehicle that was available
7 to these plans at that time were annuity
8 contracts, so we have that as a premise. They
9 -- with the passage of ERISA, it allowed them
10 to move into mutual funds and many
11 organizations like Cornell at that time took
12 the opportunity to add a mutual fund to their
13 provider to give employees the choice of --
14 between annuity contracts and mutual funds.
15 That model in itself creates difficulty in
16 moving to a true single vendor solution.

17 Q. Are there any vendors that record
18 keep both annuities and mutual funds?

19 A. Of course.

20 Q. Who are some of those vendors?

21 A. TIAA-CREF.

22 Q. Transamerica?

23 A. Transamerica at one time
24 administered annuities but they -- that is not
25 their current model to my understanding.

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1 Q. Are there any others?

2 A. VALIC.

3 Q. So at least three recordkeepers out
4 there during this time period could record keep
5 both annuities and mutual funds?

6 A. Yes.

7 Q. Generally, is the literature from
8 experts and professionals in the defined
9 contribution space, that consolidation to a
10 single recordkeeper is a recommended practice?

11 MS. ROSS: Objection.

12 THE WITNESS: As a process that --
13 for 401(k) plans is a -- it's certainly a
14 recommended structure. 401(k) assets are
15 maintained in trusts where 403(b) plans are
16 maintained in annuity contracts and the
17 custodial accounts, different than a 401(k)
18 plan, but the bottom line is, there -- other
19 than the movement of -- to TIAA as a sole
20 recordkeeper in the elimination of Fidelity
21 fund, would have been the only conventional
22 model they got to a true single recordkeeper
23 solution here.

24 BY MR. ROHLF:

25 Q. Now you said 401(k) assets are held

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1 decade or so.

2 A. They did.

3 Q. All right. And are they generally
4 an expert in recordkeeping and administrative
5 services?

6 A. They are a national player, so I
7 think it's fair to refer to them as that.

8 Remember now, that when we are talking about
9 403(b) plans, that we have a number of
10 different situations.

11 We have both ERISA plans, we have
12 nonERISA plans, including both governmental
13 plans and plans that are private employers
14 plans, but are not -- that take the exemption
15 from ERISA there.

16 For -- many plans, historically, had
17 numerous vendors, I had evaluated plans that
18 had 50, 60, 70 vendors in place, in times gone
19 past, so when you refer to multiple vendors and
20 reducing, you know, and you got to go back in
21 history and understand that many of these plans
22 had, you know, many more than two vendors,
23 five -- -- in often cases, five or more.

24 Q. All right. I'm going to show you a
25 document that's going to be Exhibit 288 -- 289.

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1 potentially talk about what roles the vendor
2 can take, you know, from -- off the shoulders
3 of the clients.

4 So it would talk about -- my role
5 wasn't specifically to recommend. It was to be
6 the industry expert and explaining the options
7 available to the clients.

8 Q. Based on the explanation of these
9 options, did a number of clients decide to
10 consolidate to a single recordkeeper?

11 MS. ROSS: Objection.

12 THE WITNESS: It was -- several did.

13 BY MR. ROHLF:

14 Q. What plans were those?

15 A. Cal Tech and Leigh High.

16 Q. Any others?

17 A. Not that had made the decision as of
18 the time I retired.

19 Q. What about Howard University?

20 A. Howard -- my project for Howard
21 University predicated the regulations.

22 Q. Okay. Now when Cal Tech
23 consolidated to a single recordkeeper, did it
24 lower its recordkeeping fees?

25 A. I don't specifically recall. We

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1 certainly negotiated -- once we got to the
2 point where we could have a revenue credit
3 account with TIAA, we certainly took advantage
4 of that revenue credit account and negotiated
5 lower fees at that time, similar to Cornell.

6 Q. When Leigh High consolidated to a
7 single recordkeeper, were its fees reduced?

8 A. Again, I don't specifically
9 remember. Leigh High was similar to Cornell
10 and they had two plans that they -- that we
11 consolidated to a single plan so that change
12 in, in itself, would have created the
13 opportunity for cost savings, so it wasn't
14 simply a change from a multi-vendor to a single
15 vendor that -- that was a cause of the revised
16 fee structure. It was the consolidation of
17 plans.

18 Q. When did Cal Tech consolidate to a
19 single recordkeeper?

20 A. I think it was January 1, 2010.

21 Q. What about Leigh High?

22 A. That was later, I don't remember if
23 it was '13 or '14, somewhere in that range.

24 Q. Okay. When was Mercer retained by
25 Cal Tech?

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1 A. I had done a number of projects for
2 Cal Tech over the years, so I can't give you a
3 specific -- Cal Tech was an ongoing client of
4 Mercer's for many years, where we provided
5 multi-line of businesses, services under many
6 lines of business, under Mercer, including
7 retirement.

8 There was an ongoing consultant in
9 the southern California area that had worked
10 for -- worked with Cal Tech for many years on
11 their retirement plans.

12 Q. While you were advising Cal Tech,
13 did they end up negotiating a fixed or capped
14 per-participant fee at some point?

15 A. I believe their 5500 filings
16 indicate that their fee structure is a
17 per-participant based fee structure.

18 Q. Do you recall when that went into
19 effect?

20 A. Not specifically.

21 Q. Do you recall what that cap was?

22 A. I do not.

23 Q. Okay. And under that capped
24 arrangement, any excess revenue sharing above
25 the -- whatever, the \$100 or whatever it was,

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1 utilized by Mr. Otto in his calculations.

2 Q. Did you use that to do that in an
3 Excel spreadsheet or do you do it by hand, use
4 a calculator?

5 A. No, I used an Excel spreadsheet.

6 Q. Did you keep a copy of that?

7 A. I do not have a copy of it with me.

8 Q. All right. Do you know if there is
9 a copy of it?

10 A. I would have to look.

11 Q. Okay. I think we requested it and
12 it wasn't produced to us.

13 A. It is a very easy calculation.

14 Q. It's easy if you have an Excel and
15 you can do the multiple calculations.

16 A. All you have to do is take the same
17 worksheet that Mr. Otto did, and input the
18 TIAA, the TIAA fund base directly off the 5500.

19 Q. All right. Did you calculate the
20 per-participant fees for the Cal Tech plans in
21 any other years?

22 A. No, because, you know, at that
23 point, they were getting revenue sharing so I
24 didn't -- I didn't know specifics on how to
25 allocate that revenue sharing year by year.

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1 Q. Do you have any recollection of what
2 those fees were in the subsequent years?

3 A. My recollection is that they were
4 similar to what the reductions I saw with
5 Cornell, but I don't remember the specifics.

6 Q. Does that include the revenue credit
7 they also received?

8 A. The revenue credits were higher for
9 Cornell -- no, excuse me, for Cal Tech, because
10 their average balance per person as I recall
11 was higher.

12 Q. And do these per-participant fees
13 that you are remembering, are they before or
14 after the revenue sharing is applied?

15 A. They were -- well, once the revenue
16 credit account was -- what I am recalling is
17 the negotiation of the required revenue amount,
18 just like we did -- just like Captrust did with
19 Cornell. We knew at that point what the
20 required revenue was for -- for administrative
21 services.

22 Q. Okay. Can you estimate for us what
23 the Cal Tech per-participant fee was in 2011?

24 MS. ROSS: Objection. Asked and
25 answered.

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1 THE WITNESS: No.

2 BY MR. ROHLF:

3 Q. Any other year, other than 2010?

4 A. That's the only year -- again, years
5 after that would have -- there was no way to
6 determine the required revenue without knowing
7 the specifically negotiated amount with the
8 vendor.

9 Q. You said in your report, though,
10 that you verified that it was a single -- a
11 similar trajectory as Cornell. How did you
12 verify it, if you can --

13 A. Simply based on recollection. The
14 trajectory was similar in the slope.

15 Q. And what do you mean by the
16 trajectory being similar?

17 A. That we saw a -- that we were able
18 to negotiate a continued reduction in the
19 required revenue with -- with TIAA and Cal Tech
20 situation and with both TIAA and Cornell and
21 Fidelity that was done by Captrust.

22 Q. Was the magnitude of that reduction
23 the same?

24 MS. ROSS: Objection.

25 THE WITNESS: The only thing I can

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Exhibit A

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1 tell you is that to the best of my
2 recollection, it was -- it was similar. I
3 can't relate specifics. I don't have that
4 specific recollection.

5 MR. ROHLF: Okay. I think let's
6 break for lunch right now.

7 MS. ROSS: Okay.

8 THE VIDEOGRAPHER: We are going off
9 the record.

10 This is the end of Media Unit No. 3.
11 The time is 12:09.

12 (A short recess was taken.)

13 THE VIDEOGRAPHER: We are going back
14 on the record.

15 This is the beginning of Media Unit
16 No. 4.

17 The time is 12:52.

18 You may proceed, Counsel.

19 BY MR. ROHLF:

20 Q. All right. Before we broke for
21 lunch, we were talking about consolidation to a
22 single recordkeeper and some data related to a
23 number of higher education plans that
24 consolidated.

25 Have you ever heard of a firm called

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1 recordkeepers.

2 Q. What do you mean by comparable
3 organizations to Cornell?

4 A. Higher ed organizations of the size
5 and asset level of Cornell.

6 Q. Okay. Where is the cutoff on
7 participant numbers when an organization is
8 comparable to Cornell?

9 A. Well, I don't think you can do it
10 specifically on participant numbers. You would
11 look at the types of plans they have, the
12 amount of assets they have, number of
13 participants is also a characteristic but all
14 of those -- all of those issues come into
15 consideration.

16 Q. What types of plans would a plan
17 sponsor have to have to be like Cornell?

18 A. They would have -- they would have
19 -- specifically have the 403(b) plan
20 specifically and having multiple plans would
21 make their recordkeeping comparable.

22 Q. Okay. And what amount of assets
23 would they need to have to be comparable to
24 Cornell?

25 A. I would say in general, a billion

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1 dollars and over, but I would think -- but when
2 you look -- when you are looking at
3 comparables, you try to show a full range of
4 everything you can find to see how they compare
5 to the market in general.

6 Q. And how many participants would they
7 need to have to be comparable to Cornell?

8 A. Again, it would depend on the
9 situation but you would want to get as close as
10 you can.

11 Q. Okay. In your report here, you cite
12 a number of times to a Transamerica higher
13 education survey?

14 A. I -- well, I believe the
15 Transamerica survey was mentioned in the
16 plaintiff's experts' reports.

17 Q. It was also mentioned in your report
18 though.

19 A. Well, I think I -- yeah, I may have
20 mentioned it as well.

21 Q. And do you understand that
22 Transamerica does a yearly survey of higher
23 education plans?

24 A. I do.

25 Q. And did you review that survey when

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1 presented to RPOC that analyzed the fees on a
2 per-participant basis?

3 A. The -- particularly the -- the fee
4 -- the -- the revenue reports from Fidelity
5 specifically provided that information.

6 Q. Do you know if RPOC ever reviewed
7 those Fidelity reports in a meeting?

8 A. I would have no reason to know that.

9 MR. ROHLF: Okay. Let's look at one
10 of those Fidelity reports.

11 It's going to be Exhibit 295.

12 (Deposition Exhibit 295 was marked
13 for identification.)

14 MR. ROHLF: CAPTR_0039566.

15 BY MR. ROHLF:

16 Q. Is this the type of Fidelity report
17 you were discussing?

18 A. Yes.

19 Q. Where does this analyze the fees on
20 a per-participant basis?

21 A. On Page 6.

22 Q. So it does -- but it only calculates
23 out for Fidelity the per-participant fee; is
24 that correct?

25 A. This is a Fidelity report.

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1 What's the fourth best practice
2 there?

3 A. It says: "Benchmark and negotiate
4 recordkeeping and trustee fees at least every
5 other year."

6 Q. Do you agree that that's a best
7 practice?

8 A. Yes.

9 Q. Did Cornell negotiate at least every
10 other year?

11 A. They regularly negotiated, and I
12 think we saw the results of those negotiations
13 and the -- the regular drop in fees.

14 Q. Can you read the first sentence
15 underneath that for me out loud.

16 A. Under 4?

17 Q. Yep.

18 A. "Comparing a plan's recordkeeping
19 and trustee fees to the fees of other plans
20 based on survey data or publicly available
21 information does not provide a fiduciary safe
22 harbor for monitoring the reasonableness of
23 fees?

24 Q. Do you agree with that statement?

25 A. It's back -- it's back to the reason

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1 why Mercer did RFIs, is that that was the --
2 that just using publicly available information
3 doesn't give you enough information to do
4 appropriate benchmarking.

5 It doesn't talk about a database
6 here. It talks about publicly available survey
7 data.

8 Q. Is a database better than publicly
9 available survey data?

10 A. I think, in general, that's -- that
11 -- that's true. In a -- in a database you
12 can -- you can slice and dice it to get the
13 information that's relevant to the -- your
14 situation.

15 Q. It's going to depend on the
16 robustness of the database, isn't it?

17 A. That would --

18 MS. ROSS: Objection.

19 Argumentative.

20 THE WITNESS: That would be true in
21 every situation.

22 BY MR. ROHLF:

23 Q. Okay. And you don't know how robust
24 the Captrust database is, do you?

25 A. I -- as I mentioned earlier, I

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1 written down here.

2 287.

3 BY MR. ROHLF:

4 Q. Can you read out loud the last
5 bullet point on this page. It's in blue.

6 A. "From a plan sponsor's governance
7 perspective, hard dollar per-participant fees
8 are generally more transparent and more
9 accurately reflect the" two -- "true cost of
10 providing administration."

11 Q. Did you know did that got changed at
12 all from this draft to the final presentation?

13 A. I have no -- no knowledge of what --
14 what changed.

15 Q. Do you agree with this statement?

16 A. Yes. I -- I think it's -- it's
17 true. It's -- but it's back, again, to --
18 remember the audience here. Talking to
19 community colleges that don't have the
20 resources that a ivy league institution has
21 with regard to ongoing monitoring.

22 Clearly, to the extent that those
23 organizations can get a fixed-fee cost, it
24 takes that -- it -- it -- it eliminates some of
25 the issues that you have to monitor on an asset

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1 base -- basis.

2 Q. Well, do you know anyone at Cornell
3 that was monitoring the fees?

4 A. Captrust.

5 Q. Captrust.

6 Do you know if Captrust looked at
7 those fees on a per-participant basis?

8 A. That would be a question for
9 Captrust.

10 Q. Okay. Did you review the Captrust
11 depositions in this case?

12 A. I reviewed -- I reviewed the -- yes,
13 I did review the Captrust depositions.

14 Q. Do you remember them discussing
15 whether they reviewed the fees on a
16 per-participant basis?

17 A. I remember -- not specifically,
18 other than I recall one deposition that -- that
19 indicated that -- that they were -- were
20 doing -- that in 2017 that they were looking at
21 it.

22 Q. Okay. In the second bullet point,
23 the second sentence, you say: "This revenue
24 approach allows" vendor to -- "vendors to widen
25 profit margins more quickly through asset

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1 growth than would be possible by increasing
2 revenues based on an increase in" -- "in the
3 number of participants."

4 And by this approach, you mean an
5 asset-based approach, right?

6 A. Yes.

7 Q. Do you -- do you --

8 A. And again, it all -- it all is
9 consistent with what I've said before, that if
10 you negotiate a fixed fee, you have less -- it
11 takes off some of the concern over ongoing
12 monitoring.

13 Q. Is it fair to say that you and your
14 colleague at Mercer regularly advised clients
15 that per-participant fees were a better method
16 of controlling plan expenses than asset-based
17 fees?

18 MS. ROSS: Objection.

19 THE WITNESS: And -- and that -- and
20 that is consistent with the -- the monitoring
21 comment.

22 BY MR. ROHLF:

23 Q. Okay. Is it your opinion that it is
24 more costly to recordkeep a fixed annuity than
25 a mutual fund?

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1 A. Yes.

2 Q. Is it your opinion it's more costly
3 to recordkeep a variable annuity than a mutual
4 fund?

5 A. Not to the same extent that it is a
6 fixed annuity.

7 Q. Okay. What is your basis for this
8 opinion?

9 A. Fixed -- fixed annuities are --
10 particularlly TIAA fixed annuities have a lot of
11 components to them. First you have multiple
12 different annuity types. You've got -- just to
13 -- to name the -- the main ones, you've got
14 RAs, GRAs, SRAs, GSRAs, a number of others.

15 You've got vintages, which require
16 monitoring the -- the investments on -- on a --
17 on multiple periods of time. You've got
18 minimum crediting rates. You've got withdrawal
19 restrictions that apply -- that -- that -- that
20 vary by contract. You have distribution
21 provisions that vary by contract and have to be
22 monitored in the recordkeeping system and
23 restricted appropriately. You've got surrender
24 charges that potentially apply, depending on
25 the actions taken by the participant. You've

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1 got -- you've even got regulatory provisions
2 that differ between annuity contracts and
3 mutual funds on a grandfathered basis.

4 You've got -- you also have to
5 take -- when you're explaining all that to new
6 participants, you've got to explain all those
7 provisions. It takes a lot more time to
8 explain all those provisions to an employee
9 than explaining -- than explaining a mutual
10 fund.

11 You also have to spend a lot more
12 time on the -- in discussing the distribution
13 phase. Annuities are -- you have a lot of
14 different options in the distribution phase
15 than in annuities that have to be -- where you
16 have to spend time with -- with the
17 participants.

18 So there are a lot of components
19 that -- that are driven in the recordkeeping.

20 Q. Have you ever been involved in
21 recordkeeping an annuity?

22 A. I have not directly kept annuities.

23 Q. Okay.

24 A. But I have -- but I -- but I worked
25 with clients who had annuities for 20 years and

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1 have had numerous discussions.

2 Q. All right. So let's break down
3 the -- the things you just listed.

4 One, multiple different types of
5 annuity contracts, right?

6 A. Right.

7 Q. There are different share classes
8 and other differences between -- within mutual
9 fund, aren't there?

10 A. There are. But you don't typically
11 have -- you don't have multiple share classes
12 in the same plan of the same -- the same fund.

13 Q. Okay. Now vintages.

14 A. Yes.

15 Q. Vintages are basically the period
16 where the fund is invested, and there may be a
17 different credit rating based on when it is
18 vested; is that right?

19 A. Yeah. Depending on the year it was
20 deposited.

21 Q. Okay. Do you know -- is it
22 generally the role of the investment manager or
23 their recordkeeper to calculate the earnings or
24 the daily valuation of a fund?

25 A. For the entire fund, it's -- it's

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1 A. I do. I -- no. I don't have any
2 reason to dispute it. But I would say that it
3 probably varies over time.

4 Q. Okay. But you don't know how much
5 it was in 2 -- how many vintage types there
6 were in 2010, do you?

7 A. I do not.

8 Q. Okay. And so you don't know if it
9 was less or more than six?

10 A. No.

11 Q. Okay. Now, you relied on -- I think
12 we discussed a number of time -- Mr.
13 Chittenden's declaration from the New York
14 University trial?

15 A. Yes.

16 Q. But you didn't review his trial
17 testimony in that case, did you?

18 A. No.

19 Q. Did you know that Mr. Chittenden
20 testified that he was not aware of any cost
21 comparison of recordkeeping an annuity versus a
22 mutual fund that had ever been conducted by
23 TIAA?

24 A. I -- I didn't review that
25 information. So I would have no way of knowing

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1 BY MR. ROHLF:

2 Q. Do you recognize this document?

3 A. I'm -- I'm looking at it.

4 I do not recall reading this
5 document.

6 Q. Okay. Can you go to Page 167.

7 MS. ROSS: Again, I'm going to have
8 the exact same objection, asking him questions
9 taken out of context of a document that, by my
10 account, is 331 pages.

11 BY MR. ROHLF:

12 Q. Sir, are you at 1 -- Page 167?

13 A. Not yet.

14 MR. HATCH: If you click on the top
15 right, those three dots, you can go straight to
16 the page site. Just type in...

17 THE WITNESS: Okay.

18 BY MR. ROHLF:

19 Q. And you'll look at Line 20.

20 It says: "Has TIAA ever quantified
21 the cost of recordkeeping fixed annuities?"

22 And Mr. -- and TIAA's corporate
23 representative answers: "I do not know with
24 specificity the costs around recordkeeping a
25 fixed annuity."

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1 A. Okay.

2 Q. Do you see that?

3 A. I do see that.

4 Q. So if TIAA's own corporate
5 representatives don't know how much it cost --
6 cost to recordkeep a fixed annuity, how do you
7 know that it costs more?

8 MS. ROSS: Objection.

9 THE WITNESS: I can just tell you
10 that it -- it has been -- that I -- that has
11 been stated to me on, you know, multiple times
12 by multiple parties. And I -- based upon my
13 understanding of the required -- all the
14 provisions within an annuity contract, that I
15 had no reason to question that.

16 MR. ROHLF: Okay.

17 MS. ROSS: And again, I'm going to
18 object. You're making assumptions by pulling
19 one line out of a 331-page document.

20 MR. ROHLF: Well, if there's a -- if
21 it's -- there's an inconsistent statement,
22 you're perfectly willing -- you -- you have
23 time to question the witness about it, Nancy.

24 MS. ROSS: Well, Joel, we're not
25 going to be here until midnight to give us all

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1 Q. And they may have a surrender
2 charge?

3 A. Again, they would potentially have
4 a -- a market value adjustment if the plan
5 sponsor moved out of that investment.

6 Q. Okay. Are you offering an opinion
7 on the difference between recordkeeping of
8 401(k) plan versus a 403(b)?

9 A. I'm offering a -- an opinion on
10 the -- on the -- whether the cost under this
11 plan was -- were -- were reasonable.

12 Q. Okay. How are -- how is
13 recordkeeping a 403(b) plan different than a
14 401(k) plan?

15 A. That -- the rec -- cost of
16 recordkeeping is dependent on all the -- all
17 the features we've discussed the before. It's
18 dependent on the complexity of the plan. It's
19 dependent upon the -- the administrative
20 structure. It's -- it's dependent on the
21 services being provided, which are often
22 different then a 401(k) plan.

23 Q. Okay. Well, you -- when was the
24 last time you advised 401(k) plans?

25 A. As I indicated earlier, some of my

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1 nonprofit clients have both 403(b)s and
2 401(k)s.

3 Q. Did they have different pricing for
4 the 401(k) plan versus their 403(b) plan?

5 MS. ROSS: Objection.

6 THE WITNESS: I would say in some
7 cases. That's probably not the norm, but in
8 some cases.

9 BY MR. ROHLF:

10 Q. But generally if a plan sponsor has
11 a 401(k) -- 401(k) and a 403(b) plan they're
12 priced the same?

13 MS. ROSS: Objection.

14 THE WITNESS: Typically vendors
15 price on a -- on their total book of business
16 with the -- the plan sponsor.

17 BY MR. ROHLF:

18 Q. What are the differences between a
19 4019k) and a 403(b) plan that causes the
20 recordkeeping cost to be different?

21 MS. ROSS: Objection. Asked and
22 answered.

23 THE WITNESS: And I -- I answered
24 that one just a second ago.

25 BY MR. ROHLF:

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1 used the information provided that you
2 mentioned -- just mentioned to -- to
3 demonstrate that the fees paid by -- by Cornell
4 were comparable to most other organizations.

5 BY MR. ROHLF:

6 Q. And most other organizations, you
7 just mean institutions of higher education?

8 A. Yes.

9 Q. You didn't look at any healthcare
10 plans, did you?

11 A. I didn't have information on
12 healthcare plans that were receiving -- that
13 had comparable plans with comparable services.

14 Q. Okay. But would healthcare plans be
15 a good benchmark if you had access to some?

16 A. Only if they -- again, I could
17 demonstrate that those plans were -- were
18 comparable in -- in the different components I
19 just mentioned.

20 Q. Okay. And you looked at some data
21 that Cammack provided to Columbia; is that
22 correct?

23 A. Yes.

24 Q. And how did you get that data?

25 A. It was provided through Cornerstone.

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1 Q. Now, your process at Mercer involved
2 comparing fees to multiple vendors through an F
3 -- RFI, correct?

4 A. Correct.

5 Q. So you didn't use the same
6 methodology you used in practice at Mercer
7 here; is that correct?

8 MS. ROSS: Objection. I can't hear
9 you.

10 BY MR. ROHLF:

11 Q. So you did not use the same
12 methodology here as you did in practice,
13 correct?

14 A. I did not go out and conduct an RFI,
15 no.

16 Q. And you didn't rely on any RFI
17 results either?

18 A. Correct.

19 Q. Now, the data you -- you rely on
20 from Captrust is from 2014 to 2017; is that
21 correct?

22 A. Yes.

23 Q. Okay. At Mercer did you ever rely
24 on data from Captrust?

25 A. No.

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1 enough Excel that PDF expert will work for you.
2 Let me know if it looks funny.

3 THE WITNESS: It's looking okay.

4 BY MR. ROHLF:

5 Q. Do you recognize this document?

6 A. I do.

7 Q. And what is it?

8 A. It's the document that we received
9 from Captrust that provided some comparable
10 data to other clients of theirs.

11 Q. Okay. And it lists around 13
12 schools there, one of those being Cornell?

13 A. I didn't -- that sounds about --
14 that sounds right.

15 Q. Okay. And you excluded Kinkaid
16 College and Wofford College, Wofford College?

17 Is that how --

18 A. Yes, I did.

19 Q. -- you say it? Okay.

20 Now, in 2014 do you recall how many
21 participants there were for -- in Wofford?

22 A. I'd have to look that -- look that
23 up. But in the neighborhood of 20,000.

24 Q. Yeah.

25 So I think -- 18,470, does that

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1 sound around right -- about right?

2 A. How many?

3 Q. 18,470?

4 We -- I can pull up the 5500 --

5 A. Yeah. I don't -- I don't have any
6 reason to question that.

7 Q. Okay. And 10,982 for -- for TDA;
8 does that sound about right?

9 A. Yes.

10 Q. Okay. And that's just participants
11 in the two Cornell plans.

12 There are also the Weill Cornell
13 plans, correct?

14 A. Yes.

15 Q. All right. And they -- they use
16 TIAA as well, correct?

17 A. Yes.

18 Q. Okay. Now, I think most of the --
19 most of the entries on these -- this Excel
20 spreadsheet don't have participant accounts, do
21 they?

22 A. They don't have what?

23 Q. Participant accounts.

24 A. That's correct. Only -- only three
25 of them had --

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1 Q. Okay.

2 A. -- unique participants.

3 Q. Did you investigate at all to
4 determine what the participant count were for
5 these other plans?

6 A. I have no way of doing that.

7 Q. Can you look at 5500s?

8 A. That would have -- that would have
9 told me the -- the total participants. It
10 wouldn't have given me any information
11 whatsoever of the participants by vendor.

12 Q. Okay. But the total participants in
13 the plan, that would be the maximum number that
14 could be using TIAA, right?

15 A. Yes.

16 Q. Okay. So the first one there is
17 University of Miami.

18 Do you see that?

19 A. Yep.

20 Q. Do you know if this is the
21 University of Miami in Florida or Ohio?

22 A. I didn't investigate that.

23 MR. ROHLF: Well, I think it's
24 Florida. Because I think the other one's Miami
25 University. But I could be wrong. I didn't --

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1 I also didn't investigate that.

2 But I was able to find two 5500s for
3 the University of Miami in Florida in 2014. So
4 let's -- let's look at that. Let's look at the
5 5500 for the first one, University of Miami
6 Retirement Saving Plan 2 in this --

7 MR. HATCH: Is that 2013 or 2014?

8 MR. ROHLF: 2013. Or it should
9 be --

10 MR. HATCH: One minute.

11 MR. ROHLF: Well, 2013. So 2014
12 will be somewhat similar. So...

13 And this will be Exhibit 301.

14 (Deposition Exhibit 301 was marked
15 for identification.)

16 BY MR. ROHLF:

17 Q. All right. Do you have Exhibit 301
18 in front of you?

19 A. I do.

20 Q. And is this the -- it's actually
21 2014. We pulled the wrong year here for this.
22 But the -- the Form 5500 for the University --

23 A. This is the 2013 --

24 Q. Yeah.

25 A. -- 5500.

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1 Q. Yeah. It's 2013 on this one.

2 Unfortunately we pulled --

3 MR. ROHLF: Yeah, let's -- if we
4 have 2014, let's use 2014. I want 2014. So
5 share 2014 on -- in the -- the retirement
6 savings plan 2. The same one we're on now.

7 That will be Exhibit 302.

8 (Deposition Exhibit 302 was marked
9 for identification.)

10 BY MR. ROHLF:

11 Q. Do you have Exhibit 302 in front of
12 you?

13 A. I do.

14 Q. This is a 2014 5500 for the
15 University of Miami Retirement Savings Plan 2?

16 A. Okay.

17 Q. And if I wanted to know how many
18 participants were in this plan, where would I
19 look?

20 A. You would look on the -- on the next
21 page, the number of participants with balance
22 was 2,962.

23 Q. All right. So there were 290 -- so
24 the maximum number of TIAA accounts in this
25 plan would be 20 -- 2,962, right?

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1 A. Right.

2 MR. ROHLF: And then I was able to
3 find one other plan for the University of
4 Miami. And I'm going to share it -- 5500 with
5 that -- with you right now, which is going to
6 be Exhibit 303.

7 (Deposition Exhibit 303 was marked
8 for identification.)

9 BY MR. ROHLF:

10 Q. Do you have 303 in front of you?

11 A. I do.

12 Q. And this is the University of Miami
13 Supplemental Retirement Annuity Program; is
14 that right?

15 A. Yes. That's what it says.

16 Q. And if you go down to the 6G there,
17 there's -- let's see -- it's 5,531; is that
18 right?

19 A. Yes.

20 Q. So if you add the 2,962 plus the
21 5,531, if I turn my calculator on, you get
22 8,493 participants, so roughly 8,500.

23 Does that sound right?

24 A. Yep.

25 Q. And again, at this time in the CURP

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1 alone there are over 18,000 participants,
2 right?

3 A. Yes.

4 Q. So there are 10,000 more
5 participants in the -- in the Cornell plan at
6 least.

7 MS. ROSS: Can we get back to the
8 Excel spreadsheet, please.

9 MR. ROHLF: You can pull it. It
10 should still be up on your --

11 MS. ROSS: It's not.

12 MR. HATCH: There's a side panel.

13 THE WITNESS: I don't see it.

14 MR. ROHLF: That's because it comes
15 up in a different app.

16 Just reshare it, please.

17 BY MR. ROHLF:

18 Q. And going back to the Excel
19 spreadsheet, it says there's four plans with
20 TIAA. I was only able to find two that had
21 5500. So -- and then that's the best we know
22 is there's 8,500 participants. There may be
23 others out there.

24 All right. Then the second you list
25 is Roanoke -- Roanoke College, right?

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1 If you look on that?

2 A. Yep.

3 Q. That you used. Kay and Lawford are
4 in between, but you excluded those.

5 Do you know how many participates
6 are in the Roanoke College plans?

7 A. I do not.

8 MS. ROSS: Are you providing us with
9 something? We have an airdrop popping up.

10 MR. HATCH: I just -- yeah. I
11 just --

12 MR. ROHLF: Yeah. He's a little bit
13 ahead of me. We'll get to that in a second.

14 BY MR. ROHLF:

15 Q. Did you look at their 5500s?

16 A. I did not.

17 Q. Do you know what services TIAA
18 provided to Roanoke College?

19 A. I do not.

20 MR. ROHLF: All right. Well, let's
21 look at the 5500.

22 And is this -- do you have -- it's
23 going to be Exhibit 304.

24 (Deposition Exhibit 304 was marked
25 for identification.)

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1 BY MR. ROHLF:

2 Q. Is this the Roanoke College Defined
3 Contribution Retirement Plan 2014 5500?

4 A. Yes.

5 Q. And if you go down to good old Line
6 6G, how many participants are listed there?

7 A. 1,100 and -- where am I? Sorry.
8 Lost the page. 1,156.

9 Q. And again, there were over 1,800
10 unique participants --

11 A. Yep.

12 Q. -- in CURP alone?

13 A. Right. Yep.

14 But I was trying to --

15 Q. So --

16 A. What I was trying to do with this
17 chart was simply show a range of -- of fees
18 that different organizations pay.

19 Q. Well, this is roughly 18 times --

20 A. I -- yep.

21 Q. -- and considerable magnitude less
22 in size, right?

23 A. Yes.

24 Q. As we discussed earlier, participant
25 count affects per-participant cost, right?

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1 A. It does.

2 MS. ROSS: Objection.

3 BY MR. ROHLF:

4 Q. Is it appropriate to compare a plan
5 with 1,800 participants to one with 1,100?

6 MS. ROSS: Objection.

7 Let's go back to the Excel --
8 Excel -- how do I get back to the Excel
9 spreadsheet?

10 MR. ROHLF: It's probably on a -- if
11 you double-click, you just open up another app,
12 and it should come up. It's still on your
13 screen, I'm guessing, depending on --

14 MS. ROSS: I have it.

15 BY MR. ROHLF:

16 Q. It lists two for Roanoke College, but
17 I'll represent to you I've searched form 5500s.
18 I only found one that matched Roanoke College.

19 So --

20 A. Okay.

21 Q. There may be another one sitting out
22 there. I don't know. Or Captrust could be
23 wrong.

24 So -- but either way, I don't think
25 it probably has 17,000 participants in it, do

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1 you?

2 MS. ROSS: Objection.

3 MR. DOSCH: Objection.

4 THE WITNESS: I don't know.

5 BY MR. ROHLF:

6 Q. All right. Would you have compared
7 a plan with 1,100 participants to one to 18,000
8 at Mercer?

9 A. Again, I was simply trying to
10 utilize every -- what I indicated was I was
11 strictly using all the data I could -- had
12 available to me that was provided to me to show
13 the range of fees. I wasn't -- I used every --
14 I -- I didn't cherry-pick any data. I used
15 every data point that was provided to me.

16 Q. All right. And then the next listed
17 there is Le Moyne College, I think --

18 A. Yep.

19 Q. -- if I'm pronouncing that correct?

20 A. Same -- same comment.

21 Q. So you --

22 A. I simply --

23 Q. -- you don't know how --

24 A. I'm simply used every data point
25 that was provided to me.

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1 Q. Okay. But you don't know how many
2 participants are in there?

3 A. I do not.

4 Q. And you don't know what services
5 TIAA is providing them, do you?

6 A. No.

7 MR. ROHLF: Okay. Well, let's look
8 at this 2014 5500 for Le Moyne.

9 This is going to be Exhibit 305.

10 (Deposition Exhibit 305 was marked
11 for identification.)

12 BY MR. ROHLF:

13 Q. Do you have Exhibit 305 up?

14 A. I do.

15 Q. And this is the 2014 Form 5500 for
16 Le Moyne College 403(b) plan, right?

17 A. Yep.

18 Q. And what -- how many participants
19 with active account balance are listed in Line
20 6G?

21 A. 1,167.

22 Q. So again, that's significantly less
23 than the Cornell plan, correct?

24 MS. ROSS: Objection.

25 THE WITNESS: Correct.

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1 BY MR. ROHLF:

2 Q. And the next college on the list,
3 you used Davidson College.

4 Do you know how many participants
5 were in the Davidson College plan?

6 A. I do not.

7 Q. Do you know what services TIAA
8 provided them?

9 A. No.

10 Q. Did you review the 5500s for the
11 Davidson College plan?

12 A. I did not.

13 MR. ROHLF: All right. Well, let's
14 take a look. I think it lists two Davidson
15 plans. The first we're going to show you is
16 the Davidson tax deferred annuity plan.

17 And this will be Exhibit 306.

18 (Deposition Exhibit 306 was marked
19 for identification.)

20 BY MR. ROHLF:

21 Q. All right. And so you have Exhibit
22 306 in front of you?

23 A. I do.

24 Q. And this is the 2014 Form 5500 for
25 the Davidson College Tax Deferred Annuity Plan,

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1 correct?

2 A. Yes.

3 Q. Go -- you go do to 6G, how many
4 participants are there listed there?

5 A. 1,031.

6 MR. ROHLF: 1,031.

7 Okay. Now it mentions a second
8 Davidson College plan. So I'm going to share
9 with you what's going to be Exhibit 307.

10 (Deposition Exhibit 307 was marked
11 for identification.)

12 MR. ROHLF: All right. Maybe we'll
13 -- we'll come back to the second Davidson
14 College. Evidently it's not on our iPad.

15 BY MR. ROHLF:

16 Q. All right. The next college you
17 list is Furman University. If you would go
18 back to Exhibit 300, I believe. Yeah.

19 Do you know how many participants
20 were in the Furman University plan?

21 A. I do not.

22 Q. Okay. It list two plans there for
23 Furman.

24 Do you know what services the Furman
25 University plans received?

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1 A. No.

2 MR. ROHLF: So what I'm going to
3 share with you first is the -- the 2014 Form
4 5500 for the Furman University Defined
5 Contribution Retirement Plan.

6 And this will be Exhibit 308.

7 (Deposition Exhibit 308 was marked
8 for identification.)

9 BY MR. ROHLF:

10 Q. Do you have Exhibit 308 in front of
11 you?

12 A. I do.

13 Q. And this is the form -- 2014 Form
14 5500 for the Furman University Defined
15 Contribution Retirement Plan; is that correct?

16 A. Correct.

17 Q. And how many participant are listed
18 in Line 6G?

19 A. 1,409.

20 MR. ROHLF: Okay. And now it
21 mentions a second Furman plan. So I'm going to
22 share that plan with you, which is a Furman
23 University Tax Deferred Annuity Plan.

24 This is going to be Exhibit 309.

25 (Deposition Exhibit 309 was marked

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1 for identification.)

2 BY MR. ROHLF:

3 Q. Do you have Exhibit 309 in front of
4 you?

5 A. Yes.

6 Q. And is this the Form 5500 from 2014
7 for the Furman University Tax Deferred Annuity
8 Plan?

9 A. Yes.

10 Q. And how many participants are in
11 Line 6G there?

12 A. 715.

13 Q. So if you add that 715 to the 1,409
14 we talked earlier, you get 2,124, so --

15 A. Yep.

16 Q. -- just over 2,100 participants,
17 right?

18 A. Yep.

19 Q. Is it appropriate to compare a plan
20 with 2,100 participants to 18,000?

21 A. Again, I was simply trying to show a
22 range of -- of fees for the -- for every data
23 point I had.

24 MR. ROHLF: All right. Let's go
25 back to Davidson again. I think we established

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1 the first plan had 1,031 earlier. I'm going to
2 show you the -- the Form 5500 from 2014 for the
3 Davidson College retirement plan.

4 And this is going to be Exhibit 310.

5 (Discussion held off the
6 stenographic record.)

7 MR. ROHLF: This will be 307.

8 Strike that. I forgot I used a number before.

9 This will be Exhibit 307.

10 BY MR. ROHLF:

11 Q. Do you have it in front of you?

12 A. I have the Davidson College
13 retirement plan for 2014 5500.

14 Q. Okay. And how many participants are
15 in Line 6G of that?

16 A. 1,349.

17 Q. So if we add the 1,031 from the
18 first plan to the 1,349 from this, we get
19 2,380.

20 So we'll round up to 2,400; is that
21 correct?

22 A. Okay.

23 Q. And again, that's significantly less
24 than the 18,000 that are in CURP alone,
25 correct?

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1 MS. ROSS: Objection.

2 THE WITNESS: Yes.

3 BY MR. ROHLF:

4 Q. Okay. Now, the next university
5 listed there is Wake Forest, and it says Wake
6 Forest has one plan; is that correct?

7 A. I don't have that spreadsheet in
8 front of me.

9 Q. Okay. Go back to Exhibit 300. It
10 says "Wake Forest 1 Plan."

11 Did you look at the 5500 from that
12 plan for Wake Forest?

13 A. I did not.

14 Q. Do you know what services TIAA
15 provided to Wake Forest?

16 A. I did not.

17 MR. ROHLF: All right. Well, let's
18 take a look at the 5500.

19 And this will be Exhibit 310.

20 (Deposition Exhibit 310 was marked
21 for identification.)

22 BY MR. ROHLF:

23 Q. And is this the 2014 Form 5500 for
24 the Wake Forest University Retirement Plan?

25 A. Yes.

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1 Q. And how many participants are listed
2 in Line 6G?

3 MR. DOSCH: Can you share that
4 again.

5 THE WITNESS: 4,212.

6 BY MR. ROHLF:

7 Q. And so that's 14,000 less than CURP
8 alone; is that correct?

9 A. Yes.

10 Q. And I think, if you go back -- and
11 next is the William Marsh Rice University
12 plans. And I think it lists four plans there.
13 I was only able to find two. All right? And
14 so, if you're aware of other plans, let me
15 know.

16 But did you look for the four 5500s
17 or any of these plans?

18 A. I did not.

19 MR. ROHLF: All right. Well, let's
20 look at the 5500 from the William Marsh Rice
21 Defined Contribution Plan, 2014.

22 And this will be Exhibit 311.

23 (Deposition Exhibit 311 was marked
24 for identification.)

25 BY MR. ROHLF:

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1 Q. Do you have Exhibit 311 in front of
2 you?

3 A. Yes.

4 Q. And this is a 2014 Form 5500 for the
5 William Marsh Rice University Defined
6 Contribution Plan, correct?

7 A. Yes.

8 Q. And --

9 A. Hold on a second. Okay.

10 Q. How many participants are in
11 Line 6G?

12 A. 7,296.

13 MR. ROHLF: Okay. And now I'm going
14 to share Exhibit 312 with you. This is going
15 to be the William Marsh Rice 403(b) plan Form
16 5500 for 2014.

17 (Deposition Exhibit 312 was marked
18 for identification.)

19 BY MR. ROHLF:

20 Q. Do you have Exhibit 3 -- 312 in
21 front of you?

22 A. I do.

23 Q. And is it the 2014 Form 5500 for the
24 William Marsh Rice University 403(b) plan?

25 A. Yes.

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1 Q. And how many participants are listed
2 in Line 6G there?

3 A. 4,163.

4 Q. So if we add the 4,163 to the 7,296
5 we had earlier, we get 11,459.

6 So sound about right?

7 A. Yep.

8 Q. And that's around 7,000 participants
9 less than the minimum unique participants that
10 were in the Cornell plans, correct?

11 A. Yep.

12 Q. Okay. Would you have made such a
13 comparison at Mercer?

14 A. Say that again.

15 Q. Would you have made a comparison
16 between those two plans at Mercer?

17 MS. ROSS: Objection.

18 Mischaracterizes the evidence.

19 THE WITNESS: I -- again, what I was
20 doing here was simply showing the data point --
21 every data point that I had available.

22 BY MR. ROHLF:

23 Q. Okay. And then the next plan, if
24 you go back to Exhibit 300 --

25 MR. ROHLF: Can you share this with

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1 them again. Because we're going to stay on
2 Exhibit 300 now.

3 BY MR. ROHLF:

4 Q. Do you have 300 back in front of
5 you?

6 A. I do.

7 Q. All right. And the next plan listed
8 is Princeton University.

9 A. Yes.

10 Q. And it has a unique participant
11 count for Princeton here, right?

12 A. It does.

13 Q. And what is that unique participant
14 count?

15 A. 12,634.

16 Q. And that's at least 5,000 than the
17 number of unique participants in the Cornell
18 plan, correct?

19 A. Yes.

20 Q. But it's the closest plan to the
21 Cornell plans in this document, right?

22 MS. ROSS: Objection.

23 THE WITNESS: Based upon the
24 participant counts only.

25 BY MR. ROHLF:

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1 Q. And it has a lower basis point
2 recordkeeping fee than the Cornell plans,
3 correct?

4 MS. ROSS: Objection.

5 THE WITNESS: The -- the number
6 listed here is low -- lower than the Cornell
7 fee.

8 BY MR. ROHLF:

9 Q. Okay. And the next is USC, or
10 University of Southern California, I guess is
11 how it is written out.

12 See that?

13 A. Yep.

14 Q. And again, it's just over 12,000
15 participant, right?

16 A. Right.

17 Q. So roughly 6,000 less than the
18 Cornell plans?

19 A. Right.

20 Q. USC also has a lower basis point --
21 fee than Cornell, correct?

22 A. The basis point fee, yes.

23 Q. Okay. And then the last one, which
24 is Duke.

25 A. Yes.

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1 Q. See that?

2 And Duke has 8,035 unique
3 participants, according to this document,
4 correct?

5 A. Correct.

6 Q. So let's less than half of the
7 number in any of the Cornell plans, right?

8 A. Yes.

9 Q. And Duke also has a lower basis
10 point fee than Cornell, correct?

11 A. Correct.

12 Q. All right. And then the second set
13 of Captrust data used from 2017, right?

14 A. Yes.

15 MR. ROHLF: Okay. I'm going to
16 share with you right now Captrust_45957.

17 THE WITNESS: Okay.

18 MR. ROHLF: And I think I just said
19 "Captrust." It's actually it is CP -- CAPTR_
20 for the beginning Bates on that.

21 (Deposition Exhibit 313 was marked
22 for identification.)

23 BY MR. ROHLF:

24 Q. And I'll just ask you do you
25 recognize this document?

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1 MR. ROHLF: And this will be Exhibit
2 313.

3 THE WITNESS: Yes.

4 BY MR. ROHLF:

5 Q. And what is it?

6 A. It's -- it's an e-mail from -- from
7 Barry Smith.

8 Q. And --

9 A. Well, it's -- it's a combination of
10 e-mails.

11 Q. Uh-huh.

12 And it attaching a spreadsheet,
13 which is the spreadsheet you rely on, correct?

14 A. Correct.

15 MR. ROHLF: And that -- that
16 spreadsheet is actually Bates
17 No. CAPTR_0045959. And we'll share that with
18 you.

19 And that will be Exhibit 314.

20 (Deposition Exhibit 314 was marked
21 for identification.)

22 BY MR. ROHLF:

23 Q. Do you have Exhibit 314 in front of
24 you?

25 A. I do.

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1 Q. Do you recognize this document?

2 A. I do.

3 Q. And is this the 2017 data from
4 Captrust that you relied on?

5 A. Yes.

6 Q. Okay. And there -- it has Cornell
7 listed in there, you'll see.

8 And Cornell has -- is listed as
9 having 30,234 participants; is that correct?

10 A. Yes.

11 Q. Do you know is that consistent with
12 the participant count that you used in your
13 spreadsheet?

14 A. I would have to go back and that --
15 review that.

16 MR. ROHLF: Okay. Let's share the
17 spreadsheet with him.

18 And we're going to mark this as 314.
19 (Discussion held off the
20 stenographic record.)

21 MR. ROHLF: 315. Excuse me. Thank
22 you.

23 (Deposition Exhibit 315 was marked
24 for identification.)

25 BY MR. ROHLF:

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1 Q. And this is the -- this is your
2 administrative fee analysis for the Cornell
3 University plans, correct?

4 A. You're -- you're on the -- the
5 spreadsheet labeled "Administrative Fee
6 Analysis Worksheet"?

7 Q. Yes.

8 A. Yes.

9 Q. We're on the "TIAA Total" tab,
10 right?

11 And so --

12 A. On my -- yes.

13 Q. And so for 2017 you have 25,509
14 participants listed there?

15 That's the counts, right, not --

16 A. Right.

17 Q. -- new balances.

18 Do you know why there are 5,000 more
19 in this spreadsheet from Captrust?

20 A. I would have no reason to know that.

21 Q. Did you look into it?

22 A. No.

23 Q. Did you ever think why is Captrust
24 finding 5,000 more participants than I did?

25 A. Well, again, I relied on data

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1 provided by TIAA-CREF and Fidelity. So I -- I
2 can only say what I relied on, not what they
3 relied is.

4 Q. And your per-participant fee there
5 is 97, right?

6 A. Correct.

7 MR. ROHLF: All right. Let's go
8 back to 314, which is the Captrust
9 presentation.

10 Can you reshare that, Ethan. Yeah.
11 Just reshare it. It'll be easier probably.

12 BY MR. ROHLF:

13 Q. Do you have 314 back in front of
14 you?

15 A. I would say this -- this may include
16 Weill.

17 Q. Yeah. Although Weill is listed
18 below.

19 A. Okay. You're right.

20 Q. And Captrust calculates a
21 per-participant fee as being 79 a head; is that
22 correct?

23 A. Because they -- they've got a -- a
24 bigger participant count.

25 Q. Okay. Well, whose number do you

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1 think is right, yours or Captrust's?

2 MS. ROSS: Objection.

3 Mischaracterizes the evidence.

4 THE WITNESS: We would have to go
5 back and re -- find out from Captrust where
6 they got this information.

7 BY MR. ROHLF:

8 Q. Okay. Did you try to do that in
9 preparing your report?

10 A. No.

11 Q. Okay. Now, the \$79 fee --

12 MS. ROSS: Joel, I'm just going to
13 represent to you that you're representing
14 there's two Cornell plans. But there's four
15 listed here.

16 MR. ROHLF: Okay. There's four --
17 there are four Cornell plans.

18 THE WITNESS: There are four Cornell
19 plans listed there.

20 MR. ROHLF: Yeah. So that could be
21 the --

22 THE WITNESS: So that -- that could
23 be the difference.

24 MR. ROHLF: Yeah. I'm -- it's fine.
25 I'm just trying to figure out what the

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1 difference is. So -- all right.

2 BY MR. ROHLF:

3 Q. So the Cornell fee is 79, according
4 to Captrust.

5 Are there a number of plans in here
6 that have lower per-participant fees than
7 Cornell?

8 MS. ROSS: In where?

9 MR. ROHLF: In the Captrust
10 document?

11 MS. ROSS: Which is 314?

12 MR. ROHLF: 314, yep.

13 THE WITNESS: Lower than the 79?

14 MR. ROHLF: Yeah.

15 THE WITNESS: There's a -- there's a
16 few.

17 BY MR. ROHLF:

18 Q. First one would be Emory, right, has
19 69?

20 A. Yes.

21 Q. And how many participants are in the
22 Emory plan there, according to Captrust?

23 A. 17,000.

24 Q. And so that's more than 12,000 less
25 participants than the Cornell plans?

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1 A. Well, according to --

2 MS. ROSS: Objection.

3 THE WITNESS: According to this
4 data.

5 BY MR. ROHLF:

6 Q. Okay. And the next --

7 A. Again, that's -- you know, again
8 we're -- we're comparing apples and -- we're
9 not comparing apples to apples here.

10 This -- you know, when -- you have
11 to -- you have to take this -- this information
12 for what it is. It's -- it incorporates other
13 plans as well.

14 So you can only you can only rely on
15 it for -- for what it's -- the way it was
16 listed.

17 Q. And you rely on it to find that
18 Cornell's fees are reasonable, right?

19 A. I -- I just said I relied on every
20 bit of information I could find.

21 Q. Okay. And the next, Northwestern,
22 is listed at 56; is that correct?

23 56 per participant?

24 A. Yes. For four plans.

25 Q. Four plans and 17 -- 17,500

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1 participants -- 17,500?

2 A. Yes.

3 Q. So that would be 12,000 less
4 participants than are listed for Cornell by
5 Captrust here, right?

6 MS. ROSS: Objection.

7 THE WITNESS: That's what the
8 numbers say.

9 BY MR. ROHLF:

10 Q. And the next plan with a lower fee
11 is University of Maine at \$69 a head.

12 Do you see that?

13 A. Yeah. For -- for seven different
14 plans.

15 Q. Uh-huh.

16 With 16,507 participants.

17 A. Yeah.

18 Q. Is that correct?

19 A. Right.

20 Q. So here, again, less than what
21 Captrust calculated for Cornell, correct?

22 A. Right.

23 Q. All right. And then there's also
24 \$77 a head for the University of Virginia; is
25 that correct?

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1 A. Yes.

2 Q. And that's for?

3 A. 12 different plans.

4 Q. Yep.

5 And 14,800 participants; is that
6 correct?

7 A. Yep.

8 Q. And again, that's less -- that's
9 less than half of what Captrust listed for
10 Cornell here, correct?

11 A. Right.

12 Q. And most of the other plans in this
13 document are considerably smaller than Cornell,
14 aren't they?

15 MS. ROSS: Objection.

16 THE WITNESS: According to this
17 data.

18 BY MR. ROHLF:

19 Q. So you look -- one of the ones you
20 use is American -- or Captrust uses here and
21 you rely on is the American College of
22 Cardiology?

23 A. I don't -- I don't think I utilized
24 that data.

25 Q. Okay. You didn't use that.

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1 Did you use American University?

2 A. I'd have to go back to my report to
3 determine that.

4 I seem to recall that I had another
5 document other than this that related some of
6 this information different from this.

7 Q. So another one for the TIAA pricing?

8 I think you had some for Fidelity.
9 But I think this was the only 2017 for TIAA I
10 recall. But we can --

11 A. I --

12 Q. -- go back and look at your report.

13 A. I'd have to go back and look.

14 Q. Yeah let's go back to your report,
15 which is Exhibit 282, I believe.

16 A. What's the page number?

17 Q. It's going to be probably Exhibit 4,
18 is my recollection. It's in Paragraph 90.

19 It's the page --

20 MR. ROHLF: Ethan?

21 MR. HATCH: 48.

22 BY MR. ROHLF:

23 Q. Page 48.

24 A. It's -- it's not Exhibit 4.

25 Q. Well, this is a comparison of TIAA

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1 basis plan --

2 A. This is the --

3 Q. Exhibit 8. Excuse me. I misspoke.

4 A. Exhibit 8. Right. So...

5 Q. Yeah. Exhibit 8 and 9, I guess.

6 A. Okay. So -- all right. So the --

7 yeah. The document does say what was included.

8 Q. Okay. Now, did you exclude the
9 American College of Cardiology?

10 A. No.

11 Q. All right. Well, let's go back to
12 -- did you exclude any of the plans in Exhibit
13 314?

14 A. I -- I included the ones listed here
15 in Paragraph 90.

16 MR. ROHLF: Okay. All right. So
17 let's go back to that, to Exhibit 314 again.

18 Or was it 315? I think it's 314. Oh, no.

19 315. No 314. 314 is Captrust 0045959.

20 BY MR. ROHLF:

21 Q. And so you used American College of
22 Cardiology with 1,133 participants compared to
23 what Captrust represents is a
24 30,000-participant plan here?

25 A. As I indicated, I used every data

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1 point I had available.

2 Q. That's roughly 29,000 fewer
3 participants, correct?

4 A. Than showing on here.

5 Q. Okay. And you also used American
6 University, right?

7 A. I used everything list -- everybody
8 listed in my report.

9 Q. And American University has 3,762
10 participants, according to this document,
11 right?

12 A. Yes.

13 Q. So that's almost 25 -- 26,500 in
14 difference, 26,462 to be precise.

15 A. I think we went through all this,
16 didn't we?

17 Q. We didn't for this one. We did for
18 other spreadsheet.

19 A. Okay.

20 Q. And you used Colgate School with 6
21 -- 637 participants; is that right?

22 MS. ROSS: Why don't we just
23 stipulate to what he explains in his report
24 rather than take the time to go through all of
25 these. It's pretty tedious. And all you're

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1 doing is having him confirm.

2 MR. ROHLF: Well, it's my
3 deposition. So I will ask the questions I want
4 to ask, Nancy.

5 BY MR. ROHLF:

6 Q. So 637 compared to a 30,000 --

7 A. Let's go back and see what I
8 included collegiate.

9 Q. Do you need the report back, or
10 you've got --

11 A. Yeah. I would need to go back and
12 look at the report. I just want to confirm
13 what I --

14 MS. ROSS: What paragraph did you
15 say that was in?

16 THE WITNESS: 90 --

17 MR. ROHLF: I -- it goes into --
18 it's after 91.

19 MS. ROSS: No. It's starts at 89,
20 doesn't it? Or 88, for that matter?

21 MR. ROHLF: Probably not for this
22 exact comparison. This comparison maybe starts
23 at 89, but it really gets into the details on
24 90 and 91.

25 THE WITNESS: This does not

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1 reference -- I don't see any reference to
2 Collegiate School.

3 BY MR. ROHLF:

4 Q. Well, the note below Exhibit 8, you
5 note the schools that you excluded. And you
6 say you excluded the Kinkaid School and Wofford
7 College from the 2014 comparison, but it
8 doesn't state that you excluded anything --

9 A. Well, it does -- well, it does say I
10 -- what I included.

11 Q. Well, this says and -- I think it
12 says -- well, we can go to your backup data and
13 look. I'm fairly certain it still has this
14 plan in. But we can go -- I can show you the
15 backup data if you want to go there.

16 Would you want to look at the backup
17 data?

18 A. I'm just relying on my report here.

19 Q. Okay. Did you prepare the backup
20 data for these, or did Cornerstone do it for
21 you?

22 MS. ROSS: Objection.

23 THE WITNESS: Every -- every report
24 was -- was done -- every -- every exhibit on
25 here was approved by me.

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1 BY MR. ROHLF:

2 Q. Okay. Let's see if I can streamline
3 it a little bit.

4 Is it safe to say that all -- a
5 number of these plans that are in Exhibit 314
6 have tens of thousand less participants than
7 the Cornell plans?

8 A. That's a true statement.

9 Q. Okay. And as we discussed earlier,
10 all else held equal, participant count matters
11 a lot to pricing, doesn't it?

12 A. It's a -- it's a factor.

13 Q. And do you know the specifics of the
14 services TIAA provided to any of the plans
15 listed in Exhibit 314?

16 A. There was no way to know that
17 information.

18 Q. Okay. And I think additionally in
19 Exhibit 8 you rely on benchmark data that
20 Cammack produced for Columbia; is that correct?

21 A. Yes.

22 MR. ROHLF: All right. And I'm
23 going to share with you, and this is going to
24 be Exhibit 316. It's going to be document
25 Cornell 029338.

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1 (Deposition Exhibit 316 was marked
2 for identification.)

3 | BY MR. ROHLF:

4 Q. And I'll just ask you do you
5 recognize this document?

6 And go ahead and answer whenever
7 you're ready.

8 MS. ROSS: Well, I think you
9 mischaracterized the document, if I have it.

10 THE WITNESS: This is a -- this is a
11 letter from TIAA?

12 BY MR. ROHLF:

13 Q. Yeah. And then I think you go on
14 into a comparison, which -- it's my
15 understanding this was produced in another case
16 and then given to you for this case.

17 My understanding is the letter was
18 combined with this chart that was compared by
19 Cammack. And that's -- it appears to be what
20 you represent in your -- your report.

21 A. Right.

Q. So do you have any reason to believe this wasn't prepared by Cammack and was prepared by TIAA?

25 A. The letter is from Deborah Meyers at

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1 TIAA.

2 Q. And do you know is the -- was the
3 comparison conducted by Cammack?

4 MS. ROSS: Well --

5 MR. ROHLF: Let's go -- let's go
6 off -- let's go off for just a second, Nancy.
7 And we --

8 MS. ROSS: Okay.

9 MR. ROHLF: -- can discuss this.
10 You produced this document. I know who
11 prepared it, but I can't go into who prepared
12 it in this case.

13 And so if you want to argue about
14 who prepared it, we can. But he states in his
15 report it was Cammack. It was Cammack.

16 But I can't go into what I need to
17 do to prove that it was Cammack because it's
18 from another case of yours that you shared in
19 this case.

20 MS. ROSS: Well, does he state in --

21 THE WITNESS: If we state --

22 MR. ROHLF: He states in his
23 report --

24 THE WITNESS: If we state it --

25 MR. ROHLF: -- that it was from

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1 Cammack.

2 THE WITNESS: If I states it's from
3 Cammack, then --

4 MS. ROSS: Then we'll -- that'll --
5 that'll be the assumption here --

6 MR. ROHLF: Okay.

7 MS. ROSS: -- for purposes of this
8 deposition.

9 MR. ROHLF: Okay. All right.

10 So can we go back on now? Or did we
11 ever --

12 MS. ROSS: We didn't --

13 MR. ROHLF: We never went off?

14 Okay. All right.

15 BY MR. ROHLF:

16 Q. And you relied on this -- this chart
17 here in preparation of your report, correct?

18 A. I did.

19 Q. And how did you --

20 A. But -- but --

21 Q. -- gain access to this document?

22 A. It came through Cornerstone.

23 MS. ROSS: That's sufficient.

24 BY MR. ROHLF:

25 Q. And then it lists Columbia

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1 University and then A through K.

2 Do you see that?

3 A. Where -- where are you?

4 Q. On the chart that says "Client
5 Financial Comparison."

6 A. Yes.

7 Q. Okay. And it list Columbia and then
8 Clients A through K; is that right?

9 A. I can't see an A through K. But
10 I -- I -- I got it. I had to make it smaller.

11 Q. All right. Were you provided a key
12 to this at all?

13 A. I'd have to go back and review my --
14 my -- my notes.

15 Q. Okay. Do you know the identity of
16 any of the plans that are listed as A -- by the
17 initials -- the letters A through K?

18 A. Again, I want to go back and review
19 my notes.

20 Q. Do you know if any of them were
21 subject to ERISA?

22 A. Same -- same answer.

23 Q. Okay. Do you know when they last
24 negotiated with TIAA?

25 A. I -- I -- I only have the

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1 information provided to me.

2 Q. Okay. Do you know when they last
3 conducted an RFP?

4 A. I only have the information
5 provided.

6 Q. Do you know if they have multiple
7 vendors or a single vendor?

8 A. I do not.

9 Q. Do you know if they have
10 per-participant caps on their pricing?

11 A. -- this is the data I had.

12 Q. Did you do anything to check or
13 validate Cammack's data here?

14 A. I had no way of doing that.

15 Q. How do you know it's reliable then?

16 A. I know Cammack is a -- is an
17 organization that does a lot of this work. I
18 have no reason to question that it's accurate.

19 Q. Now, I think we discussed earlier
20 that New York University was a client of
21 Cammack at this time?

22 A. Yes.

23 Q. And I think you list in your backup
24 data, when you were discussing NYU as a basis
25 point, of NYU's plan as being 16?

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1 September 3rd, 2009, wasn't it?"

2 And he says: "I believe this is
3 accurate."

4 And then they show an exhibit.

5 He says: "Is this the RFP? It says
6 request for proposal dated September 3rd, 2009.

7 So it was actually issued on September 3rd,
8 2009, not the date you state in your
9 declaration, July, right? Can we look at the
10 page of the document."

11 And there's a number of colloquy
12 with the Court.

13 If you go down at Page 174, he says:
14 "I can't explain the inconsistency. I agree
15 this looks like the RFP."

16 Do you see that?

17 A. Yep.

18 Q. So Mr. Rezler was wrong about the
19 date of the RFP in his declaration?

20 MS. ROSS: Objection. Absolutely
21 you cannot take this out of context and ask him
22 to formulate an opinion by showing him three or
23 four pages.

24 I'm looking at page No. 11 -- 1174.

25 Okay.

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1 THE VIDEOGRAPHER: We're going back
2 on the record.

3 This is the beginning of Media Unit
4 No. 6.

5 The time is 3:43.

6 You may proceed, Counsel.

7 BY MR. ROHLF:

8 Q. All right. So switching here a
9 little bit to Exhibit 2 of your report, you
10 rely on some data from TIAA on their top 200
11 clients.

12 MR. ROHLF: Can you -- can you share
13 his report with him again. 282, Ethan.

14 It's not Exhibit 2. It's Exhibit 3
15 probably. No. Exhibit 4 probably. No. It's
16 in here somewhere. Actually I remember where
17 it is.

18 It's Exhibit 7. Excuse me. It's on
19 Page 47.

20 THE WITNESS: Yes.

21 BY MR. ROHLF:

22 Q. And here you relied on some data
23 that TIAA provided regarding their top 200
24 clients; is that correct?

25 A. That's correct.

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1 Q. Did you do anything to verify or
2 check this data?

3 A. No, I had no way of doing that.

4 Q. All right. Do you know who the top
5 200 clients of TIAA are?

6 A. No.

7 Q. Do you know what their participant
8 counts were?

9 A. I would assume they're large.
10 They're top 200.

11 Q. Okay. Do you know what their
12 fiduciary process was?

13 A. Their -- I --

14 MS. ROSS: Objection.

15 THE WITNESS: No. I had no idea
16 what their fiduciary process was.

17 BY MR. ROHLF:

18 Q. Do you know whether they were
19 subject to ERISA?

20 A. I -- I only know that these are the
21 top 200 clients of my -- you know, I included
22 my footnotes -- my note -- excuse me --

23 Q. Okay. Do you know -- sorry. I'm
24 having a moment here.

25 All right. Do you know what

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1 services TIAA provide all of these clients?

2 A. No. But I can say that TIAA service
3 -- general service requirements for large plans
4 is fairly consistent.

5 Q. Now, I think we may have touched on
6 this before, but to lay a foundation a little
7 bit where we're going, the only comparisons you
8 considered in your report were of higher
9 education plans; is that correct?

10 MS. ROSS: Objection. Asked and
11 answered.

12 THE WITNESS: Yes.

13 BY MR. ROHLF:

14 Q. And you only looked at the fees
15 those plans were paying to TIAA and Fidelity,
16 right?

17 A. Again, and the rationale for that
18 was that TIAA and Fidelity dominate the
19 marketplace for like plans providing like --
20 like services.

21 Q. Did you look at any 403(b) plans
22 outside the higher education space?

23 A. I had no information on 403(b) plans
24 outside of this sector receiving -- that are in
25 a similar situation.

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1 A. Okay. This is a 2018 document of --
2 noting their recordkeeping fees of \$41.

3 Q. Per head, right?

4 A. Per head, per -- per year. It
5 doesn't -- I don't have any information with
6 regard to whether they have annuities or the
7 specific services being provided directly to --
8 to employees.

9 Q. Well, in the plans that you looked
10 at, you didn't know the services that they were
11 being provided either, did you?

12 A. I did not.

13 Q. And you don't know for certain
14 whether they have annuities, do you?

15 A. The -- to the extent they were with
16 TIAA, then TIAA indicates that I believe
17 90-some percent of their plans have -- have
18 some costs.

19 So yeah, I think I do know when
20 those top 200 that they have annuities.

21 Q. Okay. Now, do you know how many
22 participants are in the Trinity Health plans?

23 A. I -- I do not unless it's in here
24 somewhere.

25 Q. Okay. Well, I think the fee

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1 BY MR. ROHLF:

2 Q. Okay. And as we just discussed,
3 Trinity Health was paying 41 a head in 2018?

4 A. That's what this document indicates.

5 Q. Do you remember what your
6 calculation was for the Cornell plans in 2018?

7 A. It's -- let's -- let's go back and
8 look at the document.

9 MR. ROHLF: All right. Can you get
10 his fee worksheet up again.

11 THE WITNESS: For Fidelity, which is
12 more -- more comparable, if we look at the
13 Fidelity total --

14 BY MR. ROHLF:

15 Q. Well, what's the TIAA total? I mean
16 they're --

17 A. Well, let's look at the Fidelity
18 total first. And it's \$38.

19 Q. And what's the -- what's the TIAA
20 total?

21 A. The TIAA total is \$59.

22 Q. Okay. So 18 more.

23 A. Different services and would be my
24 expectation.

25 Q. Okay.

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1 MS. ROSS: Objection.

2 THE WITNESS: I -- I know what was
3 related to me. But it was the organizations
4 that provided the information.

5 BY MR. ROHLF:

6 Q. What was related to you by the
7 organizations that provided you the
8 information?

9 A. That those were the recordkeeping
10 fees.

11 Q. Okay. But you don't -- but you
12 don't know if they included services that are
13 included for what Hewitt provide Nike here,
14 right?

15 A. Right. All -- all I know here is
16 that Hewitt was paid \$455,000 for some services
17 to the plan.

18 Q. Okay. Well, let's go down to the
19 auditor's report.

20 And it says -- if you look at Page 4
21 of the auditor's report on -- in the notes,
22 under the Note 1 and general, second paragraph
23 says: "Northern Trust Company or Northern
24 Trust, the trustee, and Hewitt Associates, Aon
25 Hewitt, or recordkeeper, is the recordkeeper of

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1 MR. ROHLF: Can you share his fee
2 worksheet with him again.

3 BY MR. ROHLF:

4 Q. So for 2010 -- oh, sorry.

5 Do you have it back up?

6 A. Yep.

7 Q. All right. Let me get my thing --
8 is this -- no. I got it.

9 So you have 2010 155; is that right?

10 A. Correct.

11 Q. So that's 120-some dollars more than
12 what Nike was paying; is that correct?

13 MS. ROSS: Objection.

14 THE WITNESS: That was -- that's the
15 calculation.

16 MR. ROHLF: Okay.

17 THE WITNESS: But I -- I will note
18 that I -- I have not seen any comparable higher
19 Ed plan pay anywhere near that level of fees in
20 2010, nor did I see any data from the
21 plaintiff's experts that demonstrated idea that
22 level of fees by a higher education
23 organization either.

24 BY MR. ROHLF:

25 Q. And the difference would be the

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1 annuities in the high touch education services?

2 MS. ROSS: Objection.

3 THE WITNESS: It's -- it's
4 everything around it. It's the -- it's the --
5 the 403(b) plans. It's the -- it's the -- it's
6 the multiple plans. You got two plans, not
7 just one. You've got the service model.
8 You've got annuities.

9 And there's a lot more complexity
10 to -- to making that analysis than just say
11 Nike is paying 29 and --

12 BY MR. ROHLF:

13 Q. Well, do all those differences make
14 it five times more expensive to recordkeep?

15 A. I can't answer that question.

16 Q. All right. Have you ever heard of
17 New Albertsons Grocery?

18 A. I -- I've heard the name. I'm not
19 -- they're not -- they don't operate in my area
20 of the country. I don't --

21 Q. Do you know if they have a 401(k)
22 plan?

23 A. I have no reason to know what plans
24 they have.

25 Q. Okay. Do you ever recall advising

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1 them when you were at Mercer?

2 A. No.

3 MR. ROHLF: All right. Let's look
4 at their 2016 Form 5500.

5 This is going to be Exhibit 324.

6 (Deposition Exhibit 324 was marked
7 for identification.)

8 THE WITNESS: Okay.

9 BY MR. ROHLF:

10 Q. Do you have Exhibit 324 in front of
11 you?

12 A. I do. Indicates they -- it's a
13 401(k) plan again. It indicates it has 30,700
14 participants.

15 Q. All right. If you go down to
16 Schedule 3, there's no one receiving indirect
17 payment?

18 MS. ROSS: Schedule 3?

19 MR. ROHLF: Schedule C. Excuse me.
20 I misspoke.

21 THE WITNESS: I don't see any
22 reference to indirect payment.

23 BY MR. ROHLF:

24 Q. Okay. And -- and if you go down to
25 the direct payments, is Fidelity listed there

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1 MS. ROSS: Objection.

2 THE WITNESS: Based on your
3 assumption that I can't verify.

4 BY MR. ROHLF:

5 Q. Okay. And that would result in a
6 30.93 per head recordkeeping fee.

7 Does that sound about right?

8 MS. ROSS: Objection.

9 MR. ROHLF: 30.94. Excuse me.

10 MS. ROSS: Objection.

11 THE WITNESS: For -- for 2016 --

12 MR. ROHLF: Yep.

13 THE WITNESS: For a 401(k) plan with
14 a different situation.

15 BY MR. ROHLF:

16 Q. And it's considerably less than
17 Cornell was paying TIAA in 2016, right?

18 MS. ROSS: Objection.

19 THE WITNESS: Considerably less.

20 But again, it's -- it's so -- it's a one --
21 it's a one-recordkeeper situation for a 401(k)
22 plan. It's a -- it's not apples to apples.
23 And I don't know that that's all the revenue.

24 BY MR. ROHLF:

25 Q. Okay. But you don't know if the

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1 comparisons you're looking at in the Captrust
2 or Cammack documents are apple to apple either,
3 do you?

4 MS. ROSS: Objection.

5 THE WITNESS: I -- I -- I know that
6 it was provided to me as -- as being relevant
7 information.

8 BY MR. ROHLF:

9 Q. Okay. Have you heard of Regions
10 Financial or Regions Bank?

11 A. I've heard of them.

12 Q. Do you know if they have a 401(k)
13 plan?

14 A. I -- I do not.

15 Q. And I think you said earlier that
16 Mercer provided recordkeeping services when you
17 worked there; is that correct?

18 MS. ROSS: Objection.

19 THE WITNESS: Mercer did provide
20 recordkeeping service, yes.

21 BY MR. ROHLF:

22 Q. Do you know if Mercer was Regions'
23 recordkeeper?

24 A. I have no knowledge of that.

25 MR. ROHLF: All right. Let's look

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1 Fidelity.

2 Q. Okay.

3 A. And again, I -- I will relate this
4 is completely different service model,
5 completely different plans. Don't have
6 annuities. This is truly apple to oranges.

7 Q. Well, does it cost four times as
8 much to recordkeep an annuity?

9 A. I -- I don't have enough information
10 from those plans. I don't know anything about
11 those plans to -- to make that kind of
12 comparison.

13 Q. But to the other comparison of plans
14 in your report, we --

15 A. I was --

16 Q. -- we talked about you didn't know
17 anything about those either, did you?

18 A. But -- but --

19 MS. ROSS: Objection.

20 THE WITNESS: Yeah. But again, I
21 was trying to demonstrate the -- the range of
22 fees that different organizations pay and --
23 you know, for -- different universities paid
24 for 403(b) administration.

25 BY MR. ROHLF:

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1 A. Yes, I do.

2 MR. ROHLF: Objection to form.

3 BY MS. ROSS:

4 Q. Okay. Did the number of
5 participants affect the relevance of this
6 exhibit in forming your opinion?

7 MR. ROHLF: Objection to form.

8 THE WITNESS: My intent with this
9 information was -- was simply to show a range
10 of what fees different higher education
11 organizations pay and how Cornell fit within --
12 within that range.

13 BY MS. ROSS:

14 Q. Okay. Did the number of
15 participants play any role?

16 MR. ROHLF: Objection to form.

17 THE WITNESS: It didn't -- it didn't
18 -- it didn't play a role in the fact that --
19 that the range exists among different higher Ed
20 organizations.

21 MS. ROSS: Okay. Okay. An, in
22 fact, let's look at Paragraph 90 of your
23 report. I think it's where you refer to this
24 particular spreadsheet.

25 Anybody have the page that

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1 DEPOSITION REVIEW
2 CERTIFICATION OF WITNESS

3
4 ASSIGNMENT REFERENCE NO: 3028112
5 CASE NAME: Cunningham, Casey, et al. v. Cornell University,
et al.

6 DATE OF DEPOSITION: 10/18/2018
7 WITNESS' NAME: Glenn Poehler
8 In accordance with the Rules of Civil
Procedure, I have read the entire transcript of
my testimony or it has been read to me.

9 I have listed my changes on the attached
Errata Sheet, listing page and line numbers as
well as the reason(s) for the change(s).

10 I request that these changes be entered
as part of the record of my testimony.

11 I have executed the Errata Sheet, as well
12 as this Certificate, and request and authorize
that both be appended to the transcript of my
testimony and be incorporated therein.

13 _____ Date Glenn Poehler

14 Sworn to and subscribed before me, a
15 Notary Public in and for the State and County,
the referenced witness did personally appear
16 and acknowledge that:

17 They have read the transcript;
18 They have listed all of their corrections
in the appended Errata Sheet;
19 They signed the foregoing Sworn
Statement; and
20 Their execution of this Statement is of
their free act and deed.

21 I have affixed my name and official seal
22 this _____ day of _____, 20 _____.
23 _____

Notary Public

24 _____
25 Commission Expiration Date

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Exhibit A